No. 95-860

In The

Supreme Court of the United States

October Term, 1995

BARBARA SMILEY,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

On Writ Of Certiorari
To The California Supreme Court

BRIEF OF AMICI CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE, CONSUMER FEDERATION OF AMERICA, AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER

ADELE P. KIMMEL
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1717 Massachusetts
Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 797-8600

ANN MILLER
(Counsel of Record)
SPECTOR, GADON &
ROSEN, P.C.
1700 Market Street
29th Floor
Philadelphia, PA 19103
(215) 241-8888

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI

Trial Lawyers for Public Justice, P.C. ("TLPJ"), Consumer Federation of America ("CFA"), and U.S. Public Interest Research Group ("PIRG") (collectively "amici") submit this brief as *amici curiae* in support of Petitioner Barbara Smiley (the "Cardholder").[1] As public interest organizations dedicated to consumer advocacy, amici contend that the decision of the Court below in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), should be reversed.

This is one of several cases brought by consumers throughout the United States who are standing up for their rights by challenging the unlawful late fees charged on credit card accounts by out-of-state banks.[2] At stake is the ability of the individual states to protect their citizens from the unscrupulous practices of out-of-state lenders who, through the guise of preemption principles, seek to unlawfully expand the scope of their home state's power so as to preempt, *inter alia*, other states' contract and consumer protection laws. Respondent Citibank (South Dakota), N.A. ("Citibank") is an out-of-state national bank that issues credit cards in California (and elsewhere), yet seeks to bypass California's contract laws.

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[1] Counsel for Petitioner and Counsel for Respondent have consented to the filing of this Brief. The respective letters of consent are being filed separately.

[2] Challenges to unlawful late fees have been successful in Pennsylvania and New Jersey. See *Mazaika v. Bank One, N.A.*, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *alloc. granted*, 659 A.2d 557 (Pa. 1995); *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, slip op., (N.J. Nov. 28, 1995) and *Hunter v. Greenwood Trust Co.*, No. A-103-94 slip op., (N.J. Nov. 28, 1995), reproduced at Pet. App. 129-224.

Relying on its home state's laws and a misinterpretation of federal law, Citibank charges California residents late fees and other penalties that are prohibited under California law. As a result of this widespread and unlawful practice, Citibank and other similarly situated banks reap staggering profits at the expense of consumers in California and other states that limit or outlaw late fee charges. This Brief is submitted in support of the Petitioner and other cardholders throughout the nation who have been and are being gouged by banks' unlawful late fee charges.

TLPJ is a national public interest law firm dedicated to using tort and trial law to advance the public good. Through involvement in precedent-setting and socially significant litigation, TLPJ seeks to protect the rights of consumers, safeguard civil rights and civil liberties, prevent toxic injuries, preserve the environment, defend workers' rights and strengthen the civil justice system. In its consumer rights litigation, TLPJ attempts to ensure that violations of consumer protection laws are remedied and deterred by compensating injured consumers. TLPJ is gravely concerned that, if state consumer protection laws are nullified through the improper application of the federal preemption doctrine, consumers will not be compensated for their injuries and violations of consumer protection laws will not be deterred. TLPJ has participated as an *amicus curiae* in litigation raising federal preemption issues before state and federal appellate courts throughout the country, as well as this Court. The federal preemption issues in which TLPJ has been involved include litigation regarding automobile design, medical devices, pesticides, hazardous substances, railroad safety, and atomic energy.

CFA is a non-profit consumer advocacy organization representing more than 250 local, state and national consumer groups with a combined membership of more than 50 million Americans.

PIRG is a national nonprofit, nonpartisan, research and advocacy organization. The group serves as the Washington, D.C. lobbying office for state PIRGs across the country.

All of the amici are deeply concerned about the potential impact of this case. If this Court fails to reverse the decision of the Supreme Court of California, millions of consumers will be adversely affected, and the ability of the individual states to protect their citizens through consumer protection and contract laws will be threatened. Congress did not intend this result. Accordingly, for the reasons set forth below, *amici* submit that the judgment of the Court below should be reversed.

SUMMARY OF THE ARGUMENT

The Court below has improperly expanded the definition of the federal term "interest" beyond its plain meaning to include "all lending charges", as defined by South Dakota law, and has thereby rendered the National Bank Act unconstitutional. This Court should not allow the Court below or Respondent to define federal law with reference to the home state's law, effectively elevating South Dakota law over the laws of California and the other states. To do so would allow South Dakota to legislate federal lending terms for the entire country in violation of the Supremacy, Commerce, and Full Faith and Credit Clauses of the United States Constitution. Congress could not have intended such an improbable result.

The informal letters and *amici* briefs of the Office of the Comptroller of the Currency ("OCC") cited by the Court below and by Respondent below are not entitled to any deference. Not only has the OCC overstepped its authority, but it has taken inconsistent and conflicting positions on the issues before this Court. Moreover, the current positions espoused by the OCC have no sustainable rationale.

Neither the size of a potential damage recovery, nor the banks' alleged "doomsday" prediction about the availability of consumer credit argued by Respondent and its *amici* below should prevent this Court from stopping the unlawful delegation of power to credit card issuer-friendly states, such as South Dakota, through the impermissibly broad reading of Section 85 made by the Court below. The policy arguments advanced by the Respondent and its *amici* below are meritless and should be made to Congress, not this Court.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF MARQUETTE EFFECTIVELY RENDERS THE NATIONAL BANK ACT UNCONSTITUTIONAL

A. "Interest" Must Be Given a Federal Meaning.

The holding of the Court below, based on its interpretation of *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), improperly ties the scope of federal preemption directly to the potentially ever-changing legislation of an individual state that is home to a national bank. The California Supreme Court's holding that South Dakota can define the federal term "interest"

in Section 30 of the National Bank Act, 12 U.S.C. § 85 ("§ 85" or "Section 85"), and not merely the arithmetic rate, effectively permits South Dakota's legislative definition of that term to displace the contract laws and consumer protection laws of all other states. In so doing, the California Supreme Court has rendered the National Bank Act unconstitutional.

The decision of the Court below impermissibly broadens the definition of "interest" making it unconstitutionally dependent on the law of a bank's home state. Under normal circumstances application of a federal act does not depend on state law. *Jerome v. United States*, 318 U.S. 101, 104 (1943). Moreover, words used in a federal statute are to be given a federal meaning when a federal statute is "[i]ntended to be nationwide in its application". *New York v. Feiring*, 313 U.S. 283, 285 (1941). *See also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (removal statute which is nationwide in its operation, was intended to be uniform in its application). Accordingly, as this Court has made clear on a number of occasions, "interest" and "rate" in § 85 are to be given clear federal definitions that do not depend on unique state definitions.

In *Haseltine v. Central Bank of Springfield*, 183 U.S. 132 (1901), this Court concluded that "the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state." *Id.* at 134. Similarly, in *Evans v. Nat'l Bank of Savannah*, 251 U.S. 108 (1919), this Court recognized that both "interest" and "usury" were determined by reference to federal law.

Likewise, in explaining the most favored lender concept of *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall) 409 (1874), this Court in *National Bank v. Johnson*,

104 U.S. 271, 277 (1881), said that the doctrine applies only "to the *rate* of interest, and not as to the character of [the bank's] contracts" (emphasis in *Johnson*).

The Court below failed to recognize that any reliance on a state definition is unconstitutional. Unless federal law directly provides the definition of interest in § 85, then Congress has unconstitutionally delegated to the South Dakota legislature the power to define federal lending terms. As one eminent jurist noted in the Pennsylvania Superior Court decision supporting the cardholders' position:

> The distinction to be drawn is that Congress may delegate power to states to establish rules or laws to be applied within their own borders, but it may not delegate authority to states to establish rules or laws for the entire country. . . .
>
> In my opinion, allowing Ohio law to define "rate of interest" in Section 85 of the NBA unconstitutionally enlarges the preemptive scope of the statute in that, by doing so, Congress is delegating to Ohio the power to legislate federal banking law for the entire country. The effect of this is to trump the individual states' consumer protection laws.
>
> Moreover, looking to state law to ascertain the preemptive reach of Section 85 produces absurd and unpredictable results. The Ohio legislature or judicial system may, at any time, alter or expand its definition of "rate of interest," thereby having further negative ramifications on this state's and other states' "non-interest rate" or consumer protection laws. Under this scheme, therefore, the legislature and/or courts of Ohio are completely unaccountable to the vast majority of cardholders – e.g., California cardholders – who are subjected to its laws. I cannot approbate such an application.

Mazaika, 653 A.2d at 656-57.

If "interest" and "rate" do no have clear federal definitions that do not include general contract terms and penalty charges, "interest" could have as many meanings as each state chose. Each state could define "interest" to include such things as attorneys' fees for collection or even court costs. The pitfalls of this approach were recognized by this Court in *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969), where it considered whether federal or state law defined the term "branch" in the National Bank Act. This Court emphasized that if state legislatures were permitted to define the federal term "branch", it would "make them the sole judges of their own powers," and that Congress "did not intend such an improbable result." *Id.* at 133-34.

Here, too, Congress did not intend for South Dakota to preempt the contract laws of California simply by revising the federal definition of interest to include penalty charges. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) (there is no reason to believe that Congress intended to rely on state law for the definition of a critical term in the statute).

B. South Dakota's Legislative Definitions of the Federal Term "Interest" Cannot Constitutionally Displace California Law.

In incorporating South Dakota's definition of interest into § 85, the Court below failed to recognize that Congress has never incorporated state law into a federal statute in any situation where one state's law would preempt other states' laws. Instead, Congress has limited

the incorporation of state law exclusively to those situations in which the state standard would operate only within the boundaries of the state itself, not in other states. *See, e.g., United States v. Sharpnack*, 355 U.S. 286 (1958) (addressing Assimilative Crimes Act of 1948, which adopted state law as the federal criminal law for military bases and federal enclaves located in each particular state).

The court below relied upon *Tikkanen v. Citibank (South Dakota), N.A.*, 801 F. Supp. 270 (D. Minn. 1992), to conclude that incorporation of state law was acceptable. That decision, however, also failed to recognize that Congress is only permitted to incorporate state standards that will operate *within* the boundaries of the state itself. The court below was unable to cite any other federal case in which Congress effectively adopted a boundless federal choice of law provision empowering one state legislature to overrule *all* of the contrary public policy decisions of another state legislature. In addition, the Court below utterly failed to address the significant differences between usury statutes, on the one hand, and the common law of contract penalties, on the other hand. In § 85, Congress only displaced the conflicting state penalties for usury. Because backend charges within a borrower's control never came within the ambit of such usury claims, but were instead regulated as a matter of contract law, Congress did not preempt those state law claims or principles.

The implications of this decision are immense. Were this Court to allow state law to define and redefine "interest" in § 85, it would lead to the unconstitutional result that Congress has authorized South Dakota to legislate federal lending terms for the whole country.

The Constitution simply does not allow banks to define federal law with reference to their own state's laws so as to obliterate the laws of California. "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Company*, 448 U.S. 261, 272 (1980); *see also Irwin v. Citibank (South Dakota), N.A.*, 26 Phila. 388, 1993 Phila. Cty. Rptr. LEXIS 59 (Ct. Common Pleas 1993) (§ 85 in a credit card case is unconstitutional to the extent it refers to state law to define "interest" and thereby preempts another state's law). Nor can the states constitutionally enlarge or diminish the scope of federal preemption by redefining the federal term "interest." *See Thomas*, 448 U.S. at 272 (Congress cannot make one state's law "supreme" to all others.)

C. The Decision of the Court Below Unconstitutionally Delegates Congressional Power to The Banks' Home States.

The Court must construe a statute to avoid serious constitutional problems unless such construction is plainly contrary to the intent of Congress. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). To construe "interest" in § 85 as being dependent on state law rather than federal law would render § 85 unconstitutional under U.S. Const. Art. I, § 1. That section provides that "[a]ll legislative powers . . . *shall be vested in a Congress* of the United States." U.S. Const. Art I, § 1 (emphasis

added). By permitting "interest" in § 85 to be defined pursuant to South Dakota law, the Court below has authorized Congress' delegation of such legislative authority to South Dakota. Such delegation violates Article I.

This Court has rejected such an approach in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In that case this Court struck down a statute that delegated interstate policy-making authority to the President, who then adopted state laws as the operative restrictions. This Court focused on the absence of any guidelines limiting the scope or nature of the delegated authority in rejecting the open-ended delegation. *Id.* at 415. Moreover, the Court also found that the statute was defective because it failed to provide any "standard or rule" against which the delegated authority could be measured. *Id.* at 418.

The nondelegation doctrine is important for three reasons. First, it ensures that important choices of social policy are made by Congress and not by the individual states which are, by definition, unresponsive to the popular will of the nation. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 685-688 (1980) (Rehnquist, J., concurring); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). The doctrine also provides Congress' delegatee with an "intelligible principle" to guide the exercise of the delegated discretion. *Industrial Union*, 448 U.S. at 685-86 (citations omitted). Finally, "the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *Id.* at 686 (citations omitted).

The decision whether "interest" includes liquidated damages, attorneys fees, court costs or other contractual

penalties is a decision that should be made by Congress, not by an individual state legislature that is unaccountable to the will of the nation. *See id.* at 686. Moreover, since neither the language nor the legislative history of the National Bank Act provides any guidance to the states or to a reviewing court as to the scope of the word "interest" or the limits of the delegated discretion, no such delegation can be made. Indeed, as construed by the Court below, the most favored lender doctrine itself means that a bank's home state can define anything to be "interest." Because, under the Court below's interpretation, Congress has provided no definition, established no standard, laid down no rule and declared no policy separate from that of the individual states, the delegation is unconstitutional.[3] *Panama Refining*, 293 U.S. 421, 430.

Only Congress has the open-ended discretion to choose the object and ends of national legislation. *See* L. Tribe, *American Constitutional Law* § 5-17 at 363 (2d ed. 1988). Congress may not authorize individual states to choose between different legislative needs or to substitute the will of a state legislature for that of Congress where such state decisions will have an impact nationally or on residents of other states:

> Congress cannot simply delegate to the states the power to legislate in areas that are reserved to Congress – e.g., powers under the interstate commerce clause – but Congress may by federal legislation adopt and incorporate by reference state laws that already exist or that may exist in the future. For example, *Congress cannot delegate*

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[3] *Cf. Utah League of Insured Savings Ass'ns v. Utah*, 555 F. Supp. 664, 673-74 (D. Utah 1983) (a state legislature may not delegate its lawmaking power to the federal legislature).

> *to Illinois the power to legislate federal pollution standards for the whole country. Then Congress would be abdicating interstate commerce control to one state to legislate for the entire nation.*

R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law – Substance and Procedure*, § 12.6 at 644 (1986) (emphasis added). *See also Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

To allow South Dakota to define "interest" in § 85 and, in turn, the preemptive scope of the statute, is to allow the banks' home states to substitute their will for the will of Congress. But residents of California or any state other than South Dakota have no voting opportunity to influence the legislators in South Dakota. Absent such accountability, the delegation by Congress, as found by the Court below, constitutes a serious violation of the principles embodied in Articles I and IV of the Constitution.

If South Dakota has been empowered to expand the meaning of "interest" and "rate" so as to determine what credit terms are lawful, as the decision below implicates, then South Dakota has been delegated national lawmaking authority and Supremacy Clause powers. Allowing South Dakota not just to set a time-based rate required for a loan as permitted by *Marquette* but also to define the actual rights and liabilities of cardholders (*e.g.*, what does "late" mean; are attorneys' fees collectible) subverts the entire structure of the Union. Were this decision to stand, South Dakota could define "interest" and "rate" to include attorneys fees, court costs, foreclosure costs, collection costs, fair credit reporting exemptions or any other loan-related term that might arguably have an "indirect economic effect" on a lender's total return on its

loans. Such a result could not have been intended. Congress cannot delegate its national lawmaking power in such a manner. However, were the decision of the Court below to stand, it will have effectively done so.

II. THE REGULATORY MATERIALS CITED BY THE COURT BELOW AND RESPONDENT BELOW ARE INCONSISTENT AND ARE NOT ENTITLED TO ANY DEFERENCE

A. The OCC's Views Are Not Binding On The Court.

The Court below improperly agreed with Citibank's contention that judicial deference be given to an *amicus* brief and a string of informal opinion letters issued by the Office of the Comptroller of the Currency ("OCC"). The positions taken by the OCC, however, are not entitled to any deference for the following reasons: (1) this case involves a pure case of statutory construction where there has not been an administrative proceeding before the OCC; (2) the presumption against preemption overrides any deference that might otherwise be accorded to the OCC's positions; (3) they were not issued by the Comptroller in many instances; and (4) they are inconsistent with other OCC interpretations of § 85.

This Court has instructed that, in a case like this one that involves "a pure question of statutory construction," where there has not been an administrative hearing, deference to an administrative agency's interpretation is inappropriate. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Although the Court has on occasion accorded "great weight" to the OCC's views on the National Bank Act, it has done so only where there has been an adjudicatory proceeding before the OCC, such as the granting

of a bank's application to sell annuities or establish a discount brokerage subsidiary. *See, e.g., NationsBank, N.A., v. Variable Annuity Life Ins. Co.*, ___ U.S. ___, 115 S. Ct. 810 (1995) (annuities); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) (brokerage). In such cases, the Court has respected the type of statutory interpretation that necessarily flows from the application approval process. In contrast, where, as here, the question focuses on a narrow issue of Congressional intent, and not on the broad issue of how the statute should be applied, the Court does not accord the same deference to agency interpretations. *Cardoza-Fonseca*, 480 U.S. at 446. The narrow issue of Congressional intent is a purely legal question that this Court should decide independently "using traditional tools of statutory construction." *Id.* at 448-49.

This rule is mandatory when, as here, federal preemption is at issue. Congress, not an agency opinion, must determine the scope of federal preemption. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 151-52 (1963). In fact, courts may defer to agency opinions only where a statute is "silent or ambiguous." *Chevron*, 467 U.S. at 843 ("If the intent of Congress is clear, that is the end of the matter"). When a statute is "silent or ambiguous" as to federal preemption, however, the presumption against preemption requires a court to hold that federal law does *not* preempt state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 2617 (1992) (preemption, if it is intended, must be "clear and manifest"). Therefore, when, as here, the question involves federal preemption, deference to an agency interpretation is misplaced because the very ambiguity that permits such deference proves that Congress had no

clear and manifest intent to preempt state law.[4] In short, the two concepts, agency deference and preemption, are doctrinally inconsistent and cannot coexist where Congress has not already addressed the preemption question.

Another reason that the banks' agency letters are not entitled to deference is that they were written by staff attorneys, not by the Comptroller. The OCC itself has represented to this Court that informal letters by staff members are not binding, are not reliable and do not constitute final agency action. *See* Brief For the Federal Petitioners filed in *NationsBank, N.A. v. Variable Annuity Life Insurance Co.*, Nos. 93-1612, 93-1613, brief at 38, n. 19 (U.S. filed July 29, 1994) (Amici Br. App. 8). *See also New York Stock Exch. v. Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977); *American Land Title Ass'n v. Clarke*, 743 F. Supp. 491, 494 (W.D. Tex. 1989). In addition, these letters vary in their reliance on state law to define "interest." Thus, the only agency opinions that are entitled to any deference in this case are those written by the Comptroller himself, both of which conclude that *late fees are not interest*.

Indeed, as the Supreme Court of New Jersey pointed out in *Sherman* when it rejected identical arguments proferred by Citibank, the significant inconsistent administrative treatment of "interest" with respect to the National Bank Act precluded deference to, or reliance on, the OCC interpretation (Pet. App. 174).

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[4] As this Court stated in *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), "[t]o give the State-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure on which *Garcia* relied to protect States' interests'," citing L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988).

Prior to August, 1988, the OCC consistently took the position that the interest referenced in Section 85 had a federal meaning. In the OCC Letter dated June 25, 1964, Controller Saxon took the position that charges for late payments were not properly characterized as interest (Amici Br. App. 1-3). In a letter dated October 29, 1965, Controller Saxon again declared that late fees are not interest (Amici Br. App. 4-6).

Then, in 1986, when the OCC was asked whether late fees were "interest" that could be exported under Section 85, the OCC refused to provide the answer (Pet. App. 172-173).

In 1988, the OCC added a new dimension to the confusion when it issued Interpretive Letter No. 452, which dealt with the issue of whether various fees charged by an out-of-state national bank to its credit cardholder in Iowa were interest. The agency concluded that under Section 85 the laws of a national bank's home state determine whether particular fees are material to the interest rate determination (Pet. App. 173). This letter conflicts with earlier and later OCC opinions, but has formed the basis for the decisions in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert denied*, ___ U.S. ___, 113 S. Ct. 974 (1993), and its progeny.

Then, in a letter by Peter Liebsman, Assistant Director, Bank Operations & Asset Division, on February 26, 1993, the OCC completely affirmed its earlier position that state law defined "interest" under Section 85 (Pet. App. 173-174).

Thereafter, in an Amicus Brief filed on February 1, 1995, in *Sherman v. Citibank*, (NJ), the OCC completely reversed its position, contended that "interest" must have

a federal definition and admitted that its 1988 interpretive letter and earlier briefs "overstate[d] the role of state law." (Amici Br. App. 26).

"An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (citations omitted). The OCC's recent views are inconsistent with Comptroller Saxon's own interpretation of "interest" in 1964: "*Charges for late payments . . .* are illustrations of charges which are made by some banks which *would not properly be characterized as interest.*" OCC Letter, Saxon, J. (June 25, 1964) (emphasis added) (Amici Br. App. 1-3). In addition, the OCC's recent views conflict with a 1965 interpretation by the Comptroller (Amici Br. App. 4-6) and with the government's construction of the associated term "discount rate" in § 85.[5] In defining interest in § 85, the OCC has taken numerous inconsistent or conflicting positions, as noted by the Supreme Court of New Jersey. Since the OCC's recent views on § 85 are anything but consistent, its opinions should not be

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[5] Neither the OCC nor the banks have explained (nor can they explain) why a national bank which uses the "discount rate" standard must abide by the late fee laws of the consumer's state, but may disregard those laws when it exports the "interest rate" of its home state. The only sensible construction is that a lender may use only a time-based rate or a required charge *for* a loan from its home state, excluding penalty charges, *or* the discount rate alternative, whichever is greater. If penalty charges were included in one alternative but not in the other, a lender could not intelligently choose between the two alternatives.

accorded the "substantial deference" suggested by the banks.[6]

B. The OCC's New Proposal Is A Post-Hoc Rationalization That, Without Any Sustainable Rationale, Improperly Redefines "Interest."

The OCC's latest inconsistency on this issue is in a proposed rule in which the OCC now attempts to redefine "interest" as follows:

> (a) *Definition*. The word "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for [1] any extension of credit, [2] the making available of a line of credit, or [3] any default or breach by a borrower of a condition upon which credit was extended.

60 Fed. Reg. at 11,940 (proposed for comment on Mar. 3, 1995).

Under this greatly expanded definition, "interest" would include all loan-related charges.[7] Even attorneys'

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[6] The OCC is not the only organization to take conflicting positions that impact this litigation. In its 1994 10K Dean Witter, Discover & Co. (Greenwood Trust Discover Card) defines, "non-interest revenues" as fees from, *inter alia*, cardmember fees and servicing fees (Amici Br. App. 15). One would suppose that "interest" would mean the same thing to investors as credit card holders. This definition completely contradicts Greenwood's position in *Greenwood Trust Co. v. Massachusetts, supra, Hunter v. Greenwood* (NJ) and every case in which it has been a party.

[7] The plain and ordinary meaning of interest is that it is compensation for the "use of money owed to another." *Miller v. Robertson*, 266 U.S. 243, 257 (1924). "Interest . . . cannot be predicated on anything other than a loan of money." *Title Guaranty & Surety Co. v. Klein*, 178 F. 689, 691 (3d Cir. 1909).

fees incurred in collecting on a defaulted note would be "interest," as would penalty charges long disallowed by this Court. *See Loudon v. Taxing Dist.*, 104 U.S. 777 (1882) (disallowing a charge that was not interest for the use of money).

In describing this new definition, however, the OCC inconsistently states that up-front expenses, traditionally recognized as "interest," will no longer be deemed interest. *See* 60 Fed. Reg. at 11,929 (excluding appraisal fees, document preparation fees and other closing costs); *but see* Opinion of Julie L. Williams, OCC Chief Counsel (Feb. 17, 1995) at pp. 5-6 (asserting that such expenses are interest).[8] The OCC does not explain any basis for this new distinction, nor does it provide any rationale for its new definition. In short, the OCC's new rule is neither a fair construction based on the text and structure of § 85, nor "an attempt to interpret the language of the statute, [to] fill in the gaps in the statutory coverage, or to explain how the Comptroller will exercise his discretion." *Perdue v. Crocker Nat'l Bank*, 702 P.2d 503, 523 & n.38 (Cal. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).

The OCC's newly proposed rule also is not entitled to deference because it is ad hoc and was arrived at in connection with the current litigation, solely to rationalize the result the OCC had already reached. *See Atchison*,

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"Interest," therefore, does not include charges for loan defaults or loan options. *See, e.g., Walker v. First Pennsylvania Bank, N.A.*, 518 F. Supp. 347, 353 (E.D. Pa. 1981) (a charge for an option or commitment is not interest).

[8] Under the OCC's proposed interpretation, the closing expenses in *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972), would *not* be "interest" within the meaning of § 85.

Topeka and Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 442-43 (7th Cir. 1994) (en banc) (refusing to defer to administrative construction developed only after litigation was commenced); *Martin v. Refrigeration School, Inc.*, 968 F.2d 3, 7-8 (9th Cir. 1992) (same). The obvious purpose of the proposed interpretation is to bolster the position of the OCC and the banks in this and other cases pending nationwide. The proposal does not, however, advance a common law definition of the statutory terms[9] or undertake any type of textual analysis. Because it is just a naked response to pending litigation, the proposal is not a reasonable interpretation of § 85.

Absent some sustainable rationale, an agency's legal interpretation is not entitled to deference. *Koray v. Sizer*, 21 F.3d 558, 562-63 (3d Cir. 1994), *rev'd on other grounds*, ___ U.S. ___, 115 S. Ct. 2021 (1995). The OCC's proposed rule does not have any sustainable rationale because the OCC cannot cite even one pre-1992 case holding or even suggesting that single-sum contingent charges are interest rates. The rule ignores the many cases holding that such charges are not interest rates and are illegal. *See, e.g., United States v. Childs*, 266 U.S. 304, 307 (1924) (a penalty is a means of punishment whereas interest is a means of compensation); *New Orleans Ins. Co. v. Piaggio*, 83 U.S. (16 Wall.) 378, 386 (1872) (charges in excess of time based interest not allowed). In addition, the OCC relies on cases

[9] It is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definitions of statutory terms." *United States v. Shabani*, ___ U.S. ___, 115 S. Ct. 382, 384 (1994). Here, there is no indication that Congress intended the OCC to uniquely define the § 85 terms "interest" and "rate". Instead the common law definitions of "interest" and "rate" must control.

involving "*id quod interest*," measuring "the difference between the creditor's current position and what it would have been if the loan had been timely and fully repaid." *Library of Congress v. Shaw*, 478 U.S. 310, 316 n.2 (1986).[10] But prejudgment interest has never included sum-certain penalties like late fees. *United States v. Texas*, ___ U.S. ___, 113 S. Ct. 1631, 1635 (1993). In fact, a lender was not allowed to recover more than "*id quod interest*" for a loan default. *Loudon v. Taxing District*, 104 U.S. 771 (1882); *New Orleans Ins. Co.*, 83 U.S. (16 Wall.) at 386. Therefore, the proposal's assertion that late fees are "interest" ignores relevant precedent and misinterprets the plain meaning of § 85.

The proposed rule lacks a sustainable rationale for other reasons as well. The rule continues to rely on both the same informal staff letters that erroneously define "interest" pursuant to *state* law and the same cases that use a state law definition. Yet, the OCC now concedes that federal law must define the federal term "interest rates."[11] Since the staff letters do not contain a *federal*

[10] Examples of "id quod interest" are found in *Shoemaker v. United States*, 147 U.S. 282 (1983) (interest accrues or runs) and *Brown v. Hiatts*, 82 U.S (15 Wall.) 177 (1873) (same). *See also Wilkerson (Wilkerson) v. Daniels*, 1 Greene 180, 188 (Iowa) (1848) (periodic rate); *Daggett v. Pratt*, 15 Mass. 177 (1818) (same); *Wernwag v. Mothershead*, 3 Blackf. 401 (Ind. 1834) (same); Letter from L.A. Jennings, Deputy Comptroller of the Currency (February 24, 1955) (same).

[11] It is especially curious that the OCC continues to rely on the individual views of its staff members as authority (*see, e.g.*, OCC Feb. 17, 1995 letter at p. 6 n.9) since in other litigation it has taken the opposite position and has successfully argued that such individual opinions are not entitled to deference. *See NationsBank of N.C. v. Variable Annuity Life Ins.*, ___ U.S. ___, 115

definition of interest, or even discuss single-sum penalty charges, they obviously do not support the OCC's new federal definition that includes penalty charges and attorneys fees as "interest."

Discount interest is collected at the outset of a loan and can never include contingent sum-certain late fees that might not ever arise. Congress must have intended that the two alternative "*rates*" in §§ 85 and 521 (discount rate plus 1% or home state rate) would be measured the same way and would include or exclude the same types of charges. Otherwise, the regulated banks could not compare the two rates and could not make an intelligent choice between the discount rate alternative and the home state rate. As the Court reasoned in *Gustafson v. Alloyd Company*, ___ U.S. ___, 115 S.Ct. 1061 (1995), if Congress had intended a different, broader meaning for periodic "interest" than for discount "interest" in §§ 85 and 521, then Congress was required to express that difference in the text of the statutes themselves. *See Gustafson*, 115 S. Ct. at 1067-69 (Congress is presumed to intend a consistent meaning). Because "discount rate" in § 85 necessarily excludes sum-certain contingent charges like late fees, Congress must have intended that "interest at the rate" would also exclude such contract penalties.

S. Ct. 810, 816 (1995). The OCC cannot have it both ways – either the individual staff opinions are or are not entitled to deference. Moreover, not one of these individual opinions addresses single sum penalty charges.

C. The OCC Has Exceeded Its Authority By Attempting to Redefine "Interest" in § 85

In publishing the proposed rule, the OCC has exceeded the authority granted to it by Congress. For example, the OCC has demonstrated in the proposed rule that it will not follow Supreme Court authority requiring a common law definition of "interest." The OCC has argued, in effect, that "interest" in § 85 should *not* be limited to its common law meaning, but that the OCC should be able to redefine the term at any time based on its own perception of changing economic conditions and requirements of the Country. Incredibly, the OCC says it should be able to preempt California and other states' consumer protection laws simply by administratively expanding the definition of "interest" in § 85 beyond the ordinary, common sense meaning intended by Congress.

Contrary to this position, there is no indication that Congress intended an administrative definition instead of the common law definition. Nor is there any proof that Congress delegated boundless interpretive powers to the OCC, without any standards to guide or limit the OCC's purported authority. This Court should reject the OCC's attempt to enlarge its authority.

The OCC contends, however, that Congress has granted it broad powers to interpret all federal banking laws, including those pertaining to preemption.[12] If that

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[12] In the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103-328, § 114, Congress did not grant the OCC power to preempt state law. Rather, it required that any opinion by the OCC that might have a preemptive impact must first be published for notice and comment. The two are vastly different. *See* H. Conf. Rep. No.

were the case, then such a boundless delegation from Congress would not pass muster under the standards set forth in *Panama Refining Co. v. Ryan*, 293 U.S. 388. Where, as here, Congress has not provided any guidelines or standards for determining the scope of federal preemption or for checking the exercise of delegated authority, the delegation is unconstitutional. *Id.* at 418, 421. The only way to avoid that result is to construe § 85 narrowly so as not to confer limitless interpretative authority on the OCC. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (construing a federal statute so as not to preempt a California law and thereby avoiding a difficult issue of whether Congress improperly delegated authority to a federal agriculture board).

D. The OCC's New Redefinition Of "Interest" Cannot Be Applied Retroactively.

Besides exceeding its authority in issuing the proposed rule, the OCC apparently hopes to apply the rule retroactively. But even if the rule becomes final, its only application will be prospective. It will not have any binding effect in these cases.

In *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), this Court held that agencies may not issue retroactive rules unless Congress has expressly granted them the authority to do so. Noting that "[r]etroactivity is not favored in the law," the Court reasoned:

651, 103d Cong., 2d Sess. 55 (1994) (the notice "process is not intended to confer upon the [OCC] any new authority to preempt or to determine preemptive Congressional intent").

> [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress *in express terms* . . . . Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an *express statutory grant*.

Id. at 208-09 (emphasis added) (citations omitted). Here, there is no express statutory grant allowing the OCC to issue rules that will be given retroactive effect. Accordingly, the OCC's proposed redefinition of "interest" may not be applied retroactively. *See also* Administrative Procedure Act, 5 U.S.C. § 551(4) (governing all interpretive rules and defining them as having only future effect).

E. The OCC Disregards Public Policy Concerning Penalties Imposed Against National Banks.

This Court has held that, because a violation of § 85 subjects a national bank to a "penalty", it must "receive a strict, that is literal construction." *Tiffany*, 85 U.S. (18 Wall.) at 410. Therefore, unless § 85 "clearly prohibits" the taking of a greater rate of interest, the Court must conclude the transaction is outside the scope of the National Bank Act. *Id.* at 410-411. This Court, citing *Tiffany*, has long recognized that a national bank "is not to be subjected to a penalty unless the words of the statute plainly impose it." *Keppel v. Tiffen Savings Bank*, 197 U.S. 356, 362 (1905).

The OCC disregards this Court's construction of the National Bank Act and requests this Court to define interest "broadly." *See, e.g.*, OCC letter of Feb. 17, 1995 at 5 (stating that "Congress intended for the term 'interest'

in Section 85 to be understood broadly to include any kind of lending charge . . . "). A broad definition of interest is also reflected in the OCC's proposed interpretive rule. Under the OCC's revised interest definition, national banks will be subject to § 86 claims not just for excess "interest" under a "strict" and "literal" interpretation, and for claims that it overcharged for expenses, attorneys' fees and many other kinds of charges. Congress did not intend that result.

III. THE POLICY ARGUMENTS OF THE BANKS AND THEIR AMICI SHOULD BE MADE TO CONGRESS, NOT TO THIS COURT, AND ARE, IN ANY EVENT, MERITLESS.

In the court below the bank and its *amici* below have raised a number of policy arguments that should be made to Congress, not to this Court. The Court's role is to interpret and apply § 85 as enacted by Congress, not to rewrite legislation to address the banks' and its *amicis'* policy concerns. If the bank and its *amici* think that enforcement of § 85, as written, is contrary to public policy, they should take the matter up with Congress. Their arguments are matters of legislative policy that simply do not belong in this Court. Moreover, their arguments are wrong.

For example, the California Bankers Association, American Bankers Association, American Financial Services Association and Consumer Bankers Association ("banking associations") have argued to the Courts below that because lenders "compete on the basis of an entire package of loan fees that are inextricably related to each other," "interest" in § 85 should be interpreted to include a lender's total loan package. That argument is wrong,

not only because it was rejected by this Court in *New York Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995), but also because lenders generally compete based on interest charges that consumers know will be charged, not on an amount of late fees that might never be incurred.[13] In any event, the argument is purely a matter of policy. As this Court made clear in *Marquette*, 439 U.S. at 319, "the protection of state usury laws is an issue of legislative policy, and any plea to alter § 85 to further that end is better addressed to the wisdom of Congress than to the judgment of the Court."

The banking associations and Respondent's *amici* below also have offered numerous other arguments in this proceeding and in the other state litigation on these issues that are incorrect, involve policy and are not supported by evidence in the record. Visa U.S.A Inc. and Mastercard International Inc. ("Visa & Mastercard"), for example, have argued that prohibiting late fees will require credit card issuers to raise periodic percentage interest rates and restrict the availability of credit to high risk borrowers. Those contentions are wrong, however, both theoretically and factually. They are wrong because they necessarily assume a non-competitive market for credit cards. In a truly competitive market, the absence of

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[13] Because most consumers do not plan ahead of time to default on timely payment of their credit card bills, they do not plan to incur late fees. They, therefore, shop for credit cards based on the amount of interest that definitely will be charged, not on the amount of late fees that might never be charged. Consumers do not know from the start the total amount of late fees that eventually will be charged; the late fees are essentially hidden charges that do not factor into the consumer's choice of a credit card account.

late fees would not impact low risk borrowers because the card issuers would continue to offer low rates to attract and retain those customers. The same competitive principle would also apply to higher risk borrowers, except that they would be charged slightly higher rates.[14] Besides, because this case was dismissed on a motion to dismiss, there is no evidence in the record to support the conclusion that permitting late fees will increase the number of consumers who may qualify for a credit card. In addition, today a majority of the states permit late fees so that such arguments are, at a minimum, inapplicable.

As many card issuers have already ascertained, the banks can restructure their penalty charges to coincide with the varying risks of their credit card loans. For example, with each default, a lender can increase the applicable periodic rate to account for that default. Because the rate would account for the duration and amount of the default, unlike sum-certain late fees, it would truly reflect the risk variable. Of course, market forces naturally would tend to limit the size of the rate increase. Since a borrower could transfer his or her balance to a competing card issuer to minimize the effect of the default rate increase, the card issuer would have an incentive to keep the rate increase from becoming too

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[14] For truly high risk borrowers, such as those who are overextended and unable to pay their bills, it is far from clear that limiting late fees has had or will have any appreciable effect on the availability of credit. Even if such borrowers are left with less credit options, that result is not contrary to sound public policy. Public policy does not and should not require that overextended borrowers be allowed to overextend themselves even further so as to inevitably burden the bankruptcy courts and public assistance programs.

high. Of course, the fear of such balance transfers is what has kept card issuers from instigating such rate-based risk adjustments to replace sum-certain penalties. In short, the card issuers prefer sum-certain default fees that enable them to punish, yet not lose, customers who have missed a payment.

Another empty policy argument parroted below throughout many of the bank *amici* briefs is that requiring national banks to comply with the laws of the states where they solicit and conduct credit card business would be administratively difficult and disruptive to interstate lending. Contrary to the bank amici's claims, compliance would not be expensive or difficult. In fact, many credit card issuers already abide by applicable state restrictions and note in their disclosure charts that penalty fees are not imposed in a list of states identified by abbreviations. (Amici Br. App. 9-11). While Respondent here might incur some expense in researching and copying the same charts, given the staggering profits that could have been made from their late fees, these banks easily could afford such a minor expense.

The bank amici also complained below that, in imposing the late fees, national banks have relied on the informal OCC opinions holding that "interest" in § 85 encompasses late fees. The implication is that, if Petitioner Cardholder's interpretation of § 85 is correct, these banks will face sizable liability. However because the amount of the banks' liability is not at issue at this stage of the litigation, the potential exposure argument is premature and irrelevant. In any event, accepting that argument would encourage huge corporations to exceed the bounds of lawful activity, believing that they would never have to answer for their misconduct, because the

liability would be too great. Finally, declining to hold Citibank accountable for its misconduct because the liability would be too great would reward Citibank at the expense of other national banks that have abided by late fee restrictions in California and elsewhere. *See, e.g.*, Amici Br. App. 9-11 (exemplar of Visa credit card application noting that late fees would not be charged in states like California). Such a result would be unjust, unwarranted and untenable. Congress did not intend this.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

ADELE P. KIMMEL
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1717 Massachusetts Avenue, N.W.
Suite 800
Washington, DC 20036
(202) 797-8600

ANN MILLER
(Counsel of Record)
SPECTOR, GADON & ROSEN, P.C.
1700 Market Street, 29th Floor
Philadelphia, PA 19103
(215) 241-8888

Counsel for Amici Curiae

No. 95-860

In The

Supreme Court of the United States

October Term, 1995

BARBARA SMILEY,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

On Writ Of Certiorari
To The California Supreme Court

APPENDIX TO BRIEF OF AMICI CURIAE TRIAL LAWYERS FOR PUBLIC JUSTICE, CONSUMER FEDERATION OF AMERICA, AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER

TABLE OF APPENDIX

EXHIBIT B

JUN 25 1964

In your letter of May 22, 1964, you made three inquiries.

First, you ask the maximum interest rate that a National Bank may charge in certain specified states. Subject to certain exceptions it may generally be stated that National Banks in California, Illinois, Wisconsin and Kansas may charge interest at a rate up to ten per centum per annum, while in Illinois the normal maximum rate is seven per centum per annum.

Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a National Bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest.

Thirdly, you requested information as to the formula used by bank examiner to convert charges to rate equivalent for purpose of determining whether the charges are at an excessive rate. Because of the inter-relation of state laws with Federal laws there is no set formula. The examiner must look at each questioned transaction with the view of uncovering any unlawful practice on the part of the lending institution. In questionable cases the problem is referred to the Law Department of the Office of the Comptroller of the Currency for review.

If you should desire any additional information this Office would be please [sic] to furnish such information upon request.

Sincerely,

(Signed) James J. Saxon

James J. Saxon
Comptroller of the Currency

JUN 25 1984

In your letter of May 18, 1984, you made three inquiries.

First, you ask the maximum interest rate that a National Bank may charge in certain specified states. Subject to certain exceptions it may generally be stated that National Banks in California, Illinois, Wisconsin and Kansas may charge interest at a rate up to ten per centum per annum, while in Illinois the normal maximum rate is seven per per centum per annum.

Secondly, you inquired as to what charges paid by consumers for consumer credit obtained from a National Bank with respect to auto financing are not considered to be interest. Charges for late payments, credit life insurance, recording fees, documentary stamp are illustrations of charges which are made by some banks which would not properly be characterized as interest.

Thirdly, you requested information as to the formula used by bank examiner to convert charges to rate equivalent for purpose of determining whether the charges are

at an excessive rate. Because of the inter-relation of state laws with Federal laws there is no set formula. The examiner must look at each questioned transaction with the view of uncovering any unlawful practice on the part of the lending institution. In questionable cases the problem is referred to the Law Department of the Office of the Comptroller of the Currency for review.

If you should desire any additional information this Office would be pleased to furnish such information upon request.

Sincerely,

(Signed) James J. Saxon

James J. Saxon
Comptroller of the Currency

OCT 25 1965

This is in reply to your letter of April 23, 1965, and July 22, 1965, referred to this Office by Regional Comptroller Paul Ross and Deputy Regional Comptroller John Burt, respectively, in which you raise certain questions in connection with the interest rates which may be charged by a National Bank on small loans. Your letter of July 22, 1965, contains a copy of the Kansas Consumer Loan Act for our consideration. Your questions are as follows:

1. Is the ___ National Bank permitted to charge the rates as outlined in the Kansas Consumer Loan Act without obtaining a license?

2. Is the ___ National Bank permitted to charge a late charge when payments remain past due and unpaid for a period of ten days or more, and if so, what is the maximum amount that can be charged?

3. In the ___ National Bank permitted to charge a fee for an excessive or missing a monthly payment, and if so, what are the limits or charges of this nature?

4. What is the maximum rate of interest which the National Bank may charge on a short term, single payment loans, as is the case of a 30, 60, or 90 day loan in a small amount?

As is stated in paragraph 7310 of the *Comptroller's Manual for National Banks*, A National Bank may charge interest at the maximum rate permitted by applicable state law to any competing state lending institution. Where state law permits a higher rate of interest on specified classes of loans (for example, small loans), a National bank which makes loan at such higher rate is

subject only to such limitations relating to the classification of loans as are material to the determination of a rate of interest. It is noted that K.S.A. 16-404 provides that "(a) person doing business under the authority of . . . the United States relating to banks . . . shall not be required to become a licensee under this act . . . " Accordingly, in reply to your first question, a National Bank in Kansas may, under its existing corporate authority as set forth in paragraph Seventh of 12 U.S.C. 2, and that obtaining a license or further permission from any state or federal authority, charge interest on small loans, or loans within a certain stated amount, at the maximum rate permitted by applicable state law to any competing state lending institution operating under a small loan license.

In reply to your second and third questions, it is settled that state laws relating to interest charges are, by the terms of 12 U.S.C. 85, applicable to loans or discounts made by a National Bank only insofar as they establish the maximum rate of interest which may be lawfully charged (Tiffany v. National Bank of Missouri, 85 U.S. 409). Under the applicable Kansas laws (16-202(4) and (5)) relating to delinquency fees and deferment fees, there is no relationship between such fees and interest charges insofar as the Kansas law establishes a maximum rate of interest which may be lawfully charged. Therefore, a National Bank is not subject to the limitations imposed by Kansas law on charges for deferment, default or extension. However, a National Bank may not cloak usurious exactions under the pretense of making such charges. The amount of these charges is a matter for determination by the bank's board of directors, taking into consideration the amount of the particular loan, the extent to which the

loan is past due or extended, and the expense incurred by the bank as a result of the default or extension.

In reply to your fourth question, the provision of Kansas law applicable to loans of the 30-60-90-day type is K.S.A. 16-202(a), which provides, in pertinent part, that "(t)he parties to any . . . promissory note or other instrument of writing for the forbearance of money may stipulate therein for interest receivable upon the amount of such . . . note, or other instrument of writing, at a rate not to exceed ten percent (10%) per annum unless otherwise specifically authorized by law . . . " Lower maximum interest rates which are provided for in the Kansas Consumer Loan Act, in K.S.A. 16-202(b) and 16-410, are applicable only to installment type loans which provide for periodic payments, where as the 10% limitation of K.S.A. 16-208(2) relates to the maximum rate chargeable by National Banks on single-payment loans under Kansas law.

Sincerely,

(Signed) James J. Saxon

James J. Saxon
Comptroller of the Currency

Nos. 93-1612 and 93-1613

In the Supreme Court of the United States
October Term, 1994

NationsBank of North Carolina

PETITIONERS,

v.

Variable Annuity Life Insurance Company, et al.

Eugene Ludwig, Comptroller of the Currency, et al., petitioners

v.

Variable Annuity Life Insurance Company, et al.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

Drew S. Days, III
Solicitor General
Frank W. Hunger
Assistant Attorney General

Julie L. Williams
Chief Counsel
L. Robert Griffin
Rosa M. Koppel
Yvonne D. McIntire
Attorneys
Office of the Comptroller of the Currency
Washington, D.C. 20219
(202) 871-5200

Paul Bender
Deputy Solicitor General
Edward C. DuMont
Assistant to the Solicitor General
Mark B. Stern
Jacob M. Lewis
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

* * *

tation was at least a reasonable one. Having failed to impeach its reasonableness in light of the language and purposes of Section 92 and the remainder of the federal banking laws, the court of appeals erred in substituting its judgment for that of the Comptroller on matters within his expertise and regulatory competence.[19]

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[19] In its opposition to the certiorari petitions in this case, respondent contended (Br. in App. 12) that the Comptroller's determination is not entitled to deference because its [sic] is inconsistent with positions taken in 1978 and 1982. Even revised administrative positions are, of course, entitled to deference. *E.g., Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2160-2161 (1993). The letter to which respondent refers, however, "hardly establis[h] an inconsistent policy." *Thomas Jefferson Univ. v. Shalala*, No. 93-120 (June 24, 1994), slip op. 11-12. As we pointed out in our reply brief at the petition stage (at 3-4), the 1978 letter represents informal advice by an agency lawyer, contains no analysis supporting the views expressed, and clearly identifies its conclusions as the personal opinion of its author. See Br. in Opp. 1a-2a. Such a letter would not bind the agency or the recipient or be subject to review by the courts. See *New York Stock Exch. v. Bloom*, 562 F.2d 736, 741 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978); *American Land Title Ass'n v. Clarke*, 743 F. Supp. 491, 494 (W.D. Tex. 1989). It therefore cannot provide a basis for contending that the agency has changed course. *Independent Ins. Agents v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993). the 1982 letter sets forth a similar informal opinion by a member of the OCC legal staff. See OCC Interpretive Letter No. 241, [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85.405 (Mar. 26, 1982). Moreover, as explained in our reply brief (at 4-5), that letter's discussion of sales of term life insurance does not conflict with the Comptroller's decision in this case concerning annuities.

Late Payment Fee	$10.00. Not applicable to residents of: CO, IL, IA, KS, LA, ME, MA, MN, OK, PA, SC, WV, WI, WY, AK, NY, VA, IN, ID, NC, MO, NJ, AL, VT.
Over-Limit Fee	$7.50. Not applicable to residents of: AZ, CO, IL, IA, KS, LA, ME, MN, MS, OK, PA, SC, WV, WI, WY, AK, IN, MI, KY, MD, NC, MO, NJ, NY, AL.

Note: $12 In ME, MS, LA; $15 In NJ, PA, AL; $20 In IL, KY, NC.

This information about the costs of the card described in this application is accurate as of 12/1/90. This Information may have changed after this date. To find out what might have changed, write to us at Fleet Bank, P.O. Box 368, Providence, Rhode Island 02901-9972. This form was printed 11/13/90.

Please allow approximately 4 weeks for processing.

All information on this application is true and correct to the best of my/our knowledge and no material information has been omitted. I/we authorize the bank to gather credit information about me/us and to give information about the account to others as permitted by law. This application remains the property of the bank. I/we agree to the terms and conditions governing VISA Accounts and request that credit cards be sent to me/us and any user listed above. I/we understand that I/we must pay the bank any expenses it incurs in collecting what I/we

owe it, to the extent permitted by law, and that this includes reasonable attorney's fees and court costs. Further, I/we understand that any bank card I/we am/are issued is the property of Fleet National Bank, and may be revoked or repossessed at any time and must be returned upon request.

Commission file number 1-11758.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K
ANNUAL REPORT
PURSUANT TO SECTION 13 OR 15(d) OF
THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1994

Dean Witter, Discover & Co.
(Exact name of Registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	36-3145972 (IRS Employer Identification No.)
Two World Trade Center New York, New York (Address of principal executive offices)	10048 (Zip Code)

Registrant's telephone number, including area code:
(212) 392-2222

Securities registered pursuant to Section 12(b)
of the Act:

Title of each class	Name of exchange on which registered
Common Stock – $.01 per value	New York State Exchange Pacific Stock Exchange

Securities registered pursuant to Section 12(g)
of the Act: None

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceeding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes X No. ___.

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

As of March 24, 1995, the aggregate market value of the voting stock held by non-affiliates of the Registrant was approximately $6,989,284,053. For purposes of this information, the outstanding shares of Common Stock owned by the directors and executive officers of the Company were deemed to be held by affiliates, and the Dean Witter, Discover & Co. START Plan (Savings Today Affords Retirement Tomorrow), the SPS Transaction Services, Inc. START Plan (Savings Today Affords Retirement Tomorrow), The Savings and Profit Sharing Fund of

Sears Employees, the Dean Witter Reynolds Inc. Account Executive Productivity Compensation Plan, the Dean Witter Reynolds Inc. Branch Manager Compensation Plan and the Dean Witter, Discover & Co. Employee Stock Purchase Plan were deemed to be non-affiliates.

APPLICABLE ONLY TO CORPORATE REGISTRANTS: Indicate the number of shares outstanding of each of the Registrant's classes of common stock, as of the latest practicable date.

170,150,603 Shares of Common Stock, $.01 per value, as of March 24, 1995

DOCUMENTS INCORPORATED BY REFERENCE

1. Dean Witter, Discover & Co. 1994 Annual Report to Shareholders (for the fiscal year ended December 31, 1994). Certain information contained in this document is incorporated by reference in Parts I and II.

2. Dean Witter, Discover & Co. Proxy Statement for its 1995 Annual Meeting of Stockholders (dated March 28, 1995). Certain information contained in this document is incorporated by reference in Part III.

* * *

Consolidated Statements of Income

(in millions, except per share data)

Year Ended December 31,	1994	1993	1992
Asset management and administration fees	$ 973.0	$ 838.0	$ 679.2
Merchant and Cardmember fees	940.0	770.4	641.1
Commissions	874.3	904.0	721.9
Servicing fees	586.4	533.2	412.8
Principal transactions	421.9	405.1	433.4
Investment banking	197.9	394.9	254.6
Other	101.9	66.8	65.4
Total non-interest revenues	4,095.4	3,912.4	3,208.4
Interest revenue	2,507.2	1,909.2	1,975.1
Interest expense	1,048.5	815.3	965.8
Net interest income	1,458.7	1,093.9	1,009.3
Provision for losses on receivables	548.4	457.6	484.1
Net credit income	910.3	636.3	525.2
Net operating revenues	5,005.7	4,548.7	3,733.6
Employee compensation and benefits	1,764.2	1,703.9	1,464.1
Marketing and business development	607.2	470.4	397.2
Information processing and communications	596.7	545.9	472.9
Facilities and equipment	228.1	217.8	213.8
Other	594.9	614.5	514.8
Total non-interest expenses	3,791.1	3,552.5	3,062.8
Gain on sale of subsidiary stock	-	-	32.1
Income before income taxes and cumulative effect of accounting change	1,214.6	996.2	702.9
Income tax expense	473.7	392.6	263.8
Income before cumulative effect of accounting change	740.9	603.6	439.1
Cumulative effect of change in accounting for postretirement benefits other than pensions, net of income taxes	-	-	28.6
Net income	$ 740.9	$ 603.6	$ 410.5
Earnings per common share			
Net income	$ 4.35	$ 3.66	-
Average common shares outstanding	170.5	164.8	-
Pro forma earnings per common share			
Income before cumulative effect of accounting change		$ 3.54	$ 2.58
Cumulative effect of accounting change		-	0.17
Pro forma net income		$ 3.54	$ 2.41
Pro forma common shares outstanding		170.5	170.5

See notes to consolidated financial statements.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY
Docket No. C-11 September Term 1994, 38,817

MARC SHERMAN,
On Behalf of Himself and
All Others Similarly Situated,

Plaintiff/Appellant,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE COMPTROLLER OF THE CURRENCY IN SUPPORT OF RESPONDENT AND DEFENDANT

FROM THE OPINION OF THE SUPERIOR COURT
OF NEW JERSEY, APPELLATE DIVISION

L. ROBERT GRIFFIN
Director, Litigation
Division
Office of the Comptroller
of the Currency
250 E Street, S.W.
Independence Square
Washington, D.C. 20219
Telephone: (202) 874-5280

FAITH S. HOCHBERG
United States Attorney
IRENE DOWDY
Assistant United States
Attorney
402 East State Street,
Room 502
Trenton, N.J. 08608
Telephone: (609) 989-2190

OFFICE OF THE
COMPTROLLER
OF THE CURRENCY,
as amicus curiae

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INTRODUCTION

The Office of the Comptroller of the Currency ("OCC") is a bureau within the Department of Treasury charged with the administration of the National Bank Act, 12 U.S.C. §§ 1 *et seq.* The OCC has broad authority over the chartering, supervision, and regulation of almost every aspect of the affairs of, banks organized under the National Bank Act, including the power to determine whether a bank's activities are permissible under national banking laws. *See Independent Bankers Ass'n of Am. v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980). Citibank (South Dakota), N.A., is a national bank chartered and supervised by the OCC.

In connection with its supervision of national banks pursuant to its responsibilities under the National Bank Act, the OCC has issued several interpretations of Section 30 of the National Bank Act, codified at 12 U.S.C. § 85 (hereinafter "Section 85"). In addressing the issue presented in this case – whether Section 85 governs late payment fees that are charged by a national bank to its credit card customers in states other than the state in which the bank is located – the OCC has repeatedly held that credit card late payment charges are within the scope of charges covered by Section 85, which governs the interest rate that national banks may charge in connection with loans to their customers wherever the customer is located. This interpretation of Section 85 is entitled to judicial deference. *See Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 403-404 (1987).[1]

National banks, such as Defendant/Respondent in this action, have relied on the OCC's interpretation of Section 85 and have structured their lending programs to conform to these longstanding interpretations. Indeed, national banks lend millions of dollars of credit every day in reliance on the lending authority conferred by Section

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[1] " 'It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of the banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.' " *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 403-404 (1987) (quoting *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627 (1971)); *accord NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 63 U.S.L.W. 4076, 4077 (Jan. 18, 1995).

85 and the laws of their home states. Section 85 provides national banks predictability about their lending operations by setting a uniform standard for determining the charges that may be assessed in connection with those activities. This predictability and uniformity is critical to interstate lending. If the permissible charges for a credit card transaction were determined with reference to the home state of the borrower, the flow of interstate lending would be severely undermined. But more importantly, such a result would be contrary to the plain meaning and purpose of Section 85.

COUNTERSTATEMENT OF THE CASE

The Comptroller of the Currency adopts the Counterstatement of the Case set forth in the brief filed by Defendant/Respondent Citibank (South Dakota), N.A. (hereinafter "Citibank").

RESTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Comptroller of the Currency adopts the Restatement of the Issue Presented for Review set forth in the brief filed by Citibank.

ARGUMENT

I. SECTION 85 MANDATES THAT NATIONAL BANKS MAY CHARGE INTEREST FOR EXTENSIONS OF CREDIT AT THE RATE PERMITTED UNDER STATE LAW TO COMPETING LENDERS.

Section 85 provides that national banks may "take, receive, reserve, and charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located. . . . " The Supreme Court has explained that this provision "allows [national] banks to charge such interest as state banks may charge, and more, if by the laws of the state more may be charged by natural persons." *Tiffany v. Nat'l Bank of the State of Missouri*, 85 U.S. (18 Wall) 862, 864 (hereinafter *"Tiffany"*). Congress' purpose in enacting Section 85 was to give national banks "at least equal advantages" in their competition with state chartered lenders. *Id.* at 863. Thus, the Supreme Court viewed Section 85 as "an enabling statute, not a restraining one, except so far as it fixes a maximum rate" that national banks may charge as interest by reference to state law. *Id.* By granting national banks the ability to charge interest at the most favorable rate allowed to competing lenders – "most favored lender" status – Congress ensured that the states could not adopt unfriendly legislation that "might make [national banks'] existence in the state impossible." *Tiffany* at 864; *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 314 n.26 (citing *Tiffany*).[2]

[2] This well-settled judicial interpretation of Section 85 is reflected in OCC Interpretive Ruling 7.7310(a), originally published in 1963, which continues to provide that a "national

Interpretations of Section 85 are made with this purpose in mind.

II. NATIONAL BANKS MAY CHARGE THE SAME INTEREST PERMISSIBLE UNDER SECTION 85 TO INTRA-STATE AND INTERSTATE CUSTOMERS.

Section 85 allows national banks to charge whatever interest is permissible to state-chartered lenders. Moreover, the Supreme Court has explained that national banks may charge their credit card customers the interest rates permitted under Section 85 without regard to where the bank's customer resides or the transaction takes place. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). In short, by application of Section 85, a national bank may "export" its home state interest rates when extending credit to borrowers residing in foreign states.

In *Marquette*, the Court rejected the argument that the inequalities that arise when a national bank applies the interest rate of its home state in its dealings with residents of a foreign state violated the intent of Congress when enacting Section 85, or that impairment of the

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bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. . . . " The most favored lender doctrine also is reflected in many individual OCC rulings with regard to Section 85. *See, e.g.*, Letter from William P. Bowden, Jr., OCC Chief Counsel (Feb. 4, 1992); Letter from Robert B. Serino, OCC Deputy Chief Counsel (Policy) (Aug. 11, 1988) *reprinted in* [1988 – 1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (OCC Interp. Letter No. 452).

ability of the states to enact laws governing usury warranted limiting the application of Section 85 to transactions within the national bank's home state. *Id.* at 313-315, 318. To the extent that a foreign state's laws attempt to limit a national bank's ability to charge interest that is authorized under Section 85, those state laws are preempted. *Id.* at 318 n.31.

III. THE MEANING OF "INTEREST" WITHIN SECTION 85 IS A MATTER OF FEDERAL LAW.

Section 85 does not define interest. Moreover, Section 85 specifically requires reference to state law to determine the limits on the interest that national banks may charge. Nevertheless, federal rather than state law determines what is interest for purposes of Section 85. *See, e.g., Evans v. Nat'l Bank of Savannah*, 251 U.S. 108, 114 (1919) (federal law defines when charges by a national bank are usurious, "referring to state law only to determine the maximum permitted rate" that may be charged on the loan).[3]

Even when a federal statute looks to state law to describe permissible activities of national banks, the Supreme Court has stated that it is necessary to consider the policy behind the federal statute to determine whether a federal or state law definition controls the terms of the federal statute. For example, in *First National*

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[3] In its opinion letters discussing Section 85, the OCC has described in various ways the role of state law in the determination of what charges are permissible under the federal statute. While some letters overstate the role of state law, it is clear that the boundaries of Section 85 are a matter of federal law.

Bank in Plant City v. Dickinson, 396 U.S. 122, 130-134 (1969) (hereinafter "*Plant City*"), the Supreme Court was interpreting 12 U.S.C. § 36, the federal statute governing branching by national banks. The Court noted that "the federal statute . . . incorporated by reference the limitations which state law places on branch banking activities by state banks." *Id.* at 131. However, the Court rejected the contention that the statutory reference to state law meant that state law definitions controlled the federal statute, concluding its analysis by explaining that the definition of a term in a federal statute "must not be given a restrictive interpretation which would frustrate . . . congressional intent." *Id.* at 134. The same analysis should be applied when defining "interest" for purposes of Section 85. If adoption of a state law definition would frustrate the congressional intent in enacting Section 85, then a federal definition is required.[4]

In order to achieve the purpose of Section 85, to protect national banks from discriminatory state laws involving the interest they may charge, interest must be defined by federal law. If the states were able to determine what charges are interest for purposes of Section 85, then it is arguable that they could deny national banks the most favored lender status granted by Congress. For example, states might be able to define particular charges as something other than interest and, exercising their

[4] As in this case, *Plant City* involved differing interpretations of the definition of a term in a federal statute that made reference to state law. However, the statute at issue in *Plant City* contained a statutory definition of branch bank that aided the Court's analysis.

police powers, prohibit contracts within the state from including those charges, except when the contract involves a favored state-chartered lending institution. This is precisely the type of economic discrimination that Congress intended to prevent when it enacted Section 85. *See Tiffany*, 85 U.S. at 863. Therefore, even though Congress requires reference to state law to determine what interest a national bank located in the state may charge, what constitutes interest for purposes of Section 85 must be defined by federal law. As the Supreme Court observed in its analysis of the definition of branch in *Plant City*: "[T]o allow the States to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result. . . . " 396 U.S. 133-134. It is equally improbable that Congress intended the states to define interest for purposes of Section 85.

IV. THE COURTS AND THE OCC HAVE CONSISTENTLY CONCLUDED THAT PAYMENTS TO COMPENSATE A CREDITOR FOR EXTENDING CREDIT TO THE BORROWER OR TO COMPENSATE THE CREDITOR FOR THE BORROWER'S DEFAULT UNDER THE CREDIT AGREEMENT ARE GOVERNED BY SECTION 85.

Neither Section 85 nor regulatory definitions restrict the term "interest" to charges in any specific form.[5] Consistent with the Congressional purpose of preventing

[5] Although Section 85 does not define "interest", the term has been defined as "a charge for borrowed money[,] generally a percentage of the amount borrowed." *See Webster's Ninth New Collegiate Dictionary* 630 (1989). However, this does not mean

states from discriminating against national banks in the compensation they receive as interest for extensions of credit, the vast majority of judicial opinions interpreting Section 85 have concluded that various forms of charges fall within the scope of Section 85. *See, e.g., Union Nat'l Bank v. Louisville, New Albany, & Chicago Ry. Co.*, 163 U.S. 325 (1896) (commission); *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating-balance requirement); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-261 (8th Cir. 1977) (flat fees); *McAdoo v. Union Nat'l Bank*, 535 F.2d 1050 (8th Cir. 1976) (compensating-balance requirement); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 863 (6th Cir. 1972) (loan closing costs); *Panos v. Smith*, 116 F.2d 445 (6th Cir. 1940) (mortgage taxes and recording fees); *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992, 999 (S.D.N.Y. 1973) (service and maintenance charges); *In re Gerber's Estate*, 337 Pa. 108, 9 A.2d 438 (1939) (brokerage fees); *First Nat'l Bank v. Phares*, 70 Okla. 255, 174 P. 519 (1918) (transaction costs); *Northampton Nat'l Bank v. Attorney General*, 8 Mass. App. Ct. 809, 397 N.E.2d 1149 (1979) (annual fee).

Interpretations by the OCC over a period of decades are in accord with the judicial interpretations of Section 85. The OCC has long had in place a regulation that explicitly recognizes the application of Section 85 to all

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that interest must always be expressed as a percentage. Moreover, as discussed *infra*, to adopt a narrow interpretation of Section 85 that excludes from interest any charge except those expressed as numerical percentage charges or non-contingent charges would destroy the most favored lender status of national banks and, therefore, would be contrary to Section 85.

aspects of loan compensation that are "material to the determination of the interest rate." 12 C.F.R. § 7.7310(a).[6] The OCC also has issued interpretive letters that have concluded that various charges are governed by Section 85. *See, e.g.*, Letter from William P. Bowden, Jr., OCC Chief Counsel (Feb. 4, 1992) (credit card fees including late fees); Letter from Robert B. Serino, Deputy Chief Counsel (Policy) (Aug. 11, 1988), *reprinted in* [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (OCC Interp. Letter No. 452) (credit card late charges, returned check charges, and cash advance charges); Letter from Kenneth W. Leaf, OCC Chief National Bank Examiner 2 (Feb. 13, 1974) (Section 85 governs " 'all reasonable and necessary charges incurred in connection with the making, closing, disbursing, expending, readjusting or renewing of . . . loans' " (citation omitted)); Letter from W.M. Taylor, Deputy Comptroller of the Currency (June 10, 1961) (service charges); Letter from W.M. Taylor, Deputy Comptroller of the Currency (June 1, 1956) (fees or expenses); Letter from L.A. Jennings, Deputy Comptroller of the Currency (Feb. 24, 1955) (delinquency charges); Letter from R.B. McCandless, Deputy Comptroller of the Currency (Sept. 3, 1947) (service charges); Letter

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[6] Interpretive Ruling 7.7310 provides in pertinent part:

> A national bank may charge interest at the maximum rate permitted by State law to any competing state-chartered or licensed lending institution. If State law permits a higher interest rate on a specific class of loan, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate.

from J.L. Robertson, deputy Comptroller of the Currency (Feb. 4, 1946) (set-up charges, collection charges).[7] These letters have consistently[8] permitted national banks to charge fees that are necessary to compensate the banks for extending credit to their borrowers and to compensate the banks for the borrowers' default under the credit agreement, subject to state law limitations on these

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[7] Although the results reached by the OCC on the permissibility of the charges are consistent among the letters and consistent with judicial interpretations of Section 85, analytical variation occurred in some interpretations over the question of whether state law definitions of "interest" are automatically incorporated into Section 85. As discussed above, although Section 85 looks to state law to identify the maximum interest that national banks may charge, federal law defines what is interest for purposes of Section 85.

[8] In 1964, the OCC issued a letter to a national bank stating that charges for late payments "are illustrations of charges which are made by some banks which would not properly be characterized as interest." Letter from James J. Saxon, Comptroller of the Currency, dated June 25, 1964. It is not clear that the quoted passage was issued in the context of a determination of whether the term "interest" used in Section 85 includes late charges nor does the context of the letter clearly indicate that it is intended as a ruling of the agency with respect to that question.

In a letter concluding that appraisal fees were not governed by Section 85, a staff member of the OCC in passing expressed the view that late charges "appear not to determine the numerical rate of interest to be charged." *See* Letter from Peter Liebesman, Assistant Director, Bank Operations and Assets Division (February 26, 1993). However, the issue of late charges was not the subject of that letter and the letter does not represent the OCC's position on this issue. Letter from Wallace S. Nathan, Director, Bank Operations and Assets Division (May 23, 1994).

charges for state chartered lenders where the national bank is located.[9] Consistent with the judicial interpretations of Section 85, the charges approved in these letters have included flat charges and contingent charges.[10]

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[9] Although there is authority that the definition of interest at the time of enactment of the National Bank Act included late payment fees, *see, e.g., Brown v. Hiatts*, 82 U.S. (15 Wall) 177, 185 (1873) ("compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention"), the OCC is not persuaded that the definition of interest for purposes of Section 85 is limited to forms of payments that existed in 1864. As the Supreme Court explained in *Plant City*: "The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation." 396 U.S. at 133. To give full effect to the most favored lender status of national banks, Section 85 must be able to reflect changes in state regulation of the permissible charges for extensions of credit in response to the changing economic conditions and requirements of the country.

[10] The majority opinion in *Mazaika v. Bank One*, (Pa. Super. Ct. filed Dec. 14, 1994), 1994 Pa. Super. Lexis 3612, concluded that Section 85 does not cover charges that are not assessed on a percentage basis. This conclusion is contrary to the decisions of all other courts that have considered the issue, and the analysis in that opinion would destroy the most favored lender status that Congress granted national banks by permitting states to denote contingent charges and flat fees as something other than "interest" permitted by Section 85.

This very situation is illustrated in *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855. In that case, state law permitted savings associations to collect closing costs in addition to the maximum statutory interest rate for certain types of loans. State legislation also provided that the closing

A. THE COURTS AND THE OCC HAVE CONSISTENTLY INTERPRETED SECTION 85 TO GOVERN CREDIT CARD LATE PAYMENT CHARGES.

Every court that has considered the issue has concluded that late-payment fees are governed by 12 U.S.C. § 85, except the Superior Court of Pennsylvania.[11] *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 829-831 (1st Cir. 1992), *cert. denied*, 61 U.S.L.W. 3478 (Jan. 11, 1993); *Tikkanen v. Citibank (S.D.), N.A.*, 801 F. Supp. 270 (D. Minn. 1992) ("[L]ate fees . . . are interest within the meaning of section 85"); *Sherman v. Citibank (S.D.), N.A.*, 640 A.2d 323 (N.J.Super. Ct. App. Div. 1994) (late-payment fees) *cert. granted*, Oct. 24, 1994; *Copeland v. MBNA*

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costs would be in addition to interest authorized by law and would not be deemed to be a part of interest for purposes of state law. A borrower sued the national bank for usury under 12 U.S.C. § 86 when the bank charged for closing costs in addition to the maximum numerical interest rate allowed under state law. In affirming the trial court's dismissal of plaintiff's action, the Sixth Circuit Court of Appeals quoted with approval the trial court's conclusion that to construe Section 85 as not permitting a national bank to collect closing costs that state law permitted savings associations to collect "would place a national bank in a competitively inferior position not contemplated by the federal statute." *Id.* at 864.

[11] In *Mazaika v. Bank One, supra*, an *en banc* panel of the Superior Court of Pennsylvania concluded that while Section 85 preempted state laws that regulate the interest rate charged by national banks, the service fees charged by Bank One, including a late payment fee, were not interest under Section 85. This case was wrongly decided, with the majority opinion erroneously concluding that only numerical percentage-based charges could qualify as interest for purposes of Section 85.

America, N.A., 833 P.2d 564 (Colo. Ct. App. 1994), *cert. granted*, 1994 Colo. Lexis 808 (Oct. 24, 1994).[12] Underlying the reasoning in each of these cases is judicial recognition of the necessity of including these charges in interest in order to give effect to Congress' mandate in Section 85 that prohibits discrimination against national banks in the interest that they may charge for extensions of credit.

The OCC has long interpreted Section 85 as covering late payment charges that are authorized by the law of the state where a national bank is located. *See* Letter from L.A. Jennings, *supra* (statute providing for late payment charges at a specified numerical percentage of the amount of the late installment). Moreover, the OCC has concluded that credit card late payment charges are governed by section 85 in interpretive letters issued by its Chief Counsel, William P. Bowden, Jr., and Deputy Chief Counsel, Robert B. Serino. *See* Letter from Robert B. Serino, *supra*; Letter from William P. Bowden, Jr., *supra*. *See also* n.8, *supra*. In the Serino and Bowden letters, the OCC analyzed the cases that had interpreted Section 85 and determined that credit card late payment charges were material to the determination of the interest rate for these types of loans and, therefore, within the coverage of Section 85, even though state law did not specify a limit

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[12] Cases during the period prior to enactment of the National Bank Act recognized late payment charges on loans as interest regardless of whether they were flat fees or a higher periodic percent rate for payment after the loan was due. *See, e.g., Wernwag v. Mothershead*, 3 Blackf. 401, 402 (Ind. 1834) (flat, per week charge); *Daggett v. Pratt*, 15 Mass. 177 (1818) (increased rate of interest); *Wilkinson (Wilkerson) v. Daniels*, 1 Greene 179, 188 (Iowa 1848).

on these charges. *See Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900) (holding that an Arizona statute which allowed lenders and borrowers to contract for any rate of interest also allowed national banks to charge any rate of interest); *Hiatt v. San Francisco National Bank*, 361 F.2d 504, 507 (9th Cir. 1966) (holding that the silence of the California legislature regarding the maximum allowable rate of interest permitted national banks to charge whatever interest rate was agreed between the parties).

The late payment charges involved in this appeal are intended to compensate the bank for the borrower's default under the credit agreement. Numerous courts and long-standing interpretations of the OCC have concluded that late payment charges are within the scope of charges that national banks may collect under Section 85 when state law allows competing lenders to collect them. This Court should reach the same conclusion.

B. OCC'S INTERPRETATION OF THE NATIONAL BANK ACT IS ENTITLED TO DEFERENCE.

The OCC's interpretations of the statutes that the Congress has placed under its oversight are to be accorded substantial deference. As the Supreme Court recently observed:

> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter." *Ibid.* But "if the statute is silent or ambiguous with

> respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." *Id.*, at 844

Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Co., 63 U.S.L.W. 4076, 4077 (January 18, 1995). *See also Clarke v. Securities Industry Ass'n, supra*, 479 U.S. 403-404 (1987).

While courts have held that interpretive regulations and opinion letters are not binding upon the courts, they are entitled to substantial deference in cases, such as this, in which the agency has been vested with important interpretive powers in a complex or technical field. *See, e.g., Bright v. Ball Memorial Hosp. Ass'n*, 616 F.2d 328, 333 n.1 (7th Cir. 1980); *Charles v. Krauss Co.*, 572 F.2d 544, 547-48 (5th Cir. 1978). Indeed, the Supreme Court has on occasion afforded deference to an agency position expressed in an *amicus curiae* brief. *See Basic, Inc. v. Levison*, 485 U.S. 224, 239 n.1 (1988). *See also Trustees of Iron Workers Local 1473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 210 n.2 (7th Cir. 1989) (*amicus* brief of agency entitled to deference because of agency's responsibility to enforce statute), *cert. denied*, 493 U.S. 847 (1989).

In this case, the OCC has consistently interpreted Section 85 to permit national banks to receive interest in the form of charges other than a numerical interest rate and has specifically concluded that credit card late payment charges are governed by Section 85. Virtually every

court that has considered the issue has reached the same conclusion as the OCC. This consistent interpretation, confirmed by numerous judicial decisions, is entitled to great weight.

CONCLUSION

For the reasons stated above, the Comptroller of the Currency respectfully requests that this Court affirm the decision of the Court of Appeal.

Respectfully submitted,

/s/ L. Robert Griffin
L. ROBERT GRIFFIN
HORACE G. SNEED
Office of the Comptroller
of the Currency
250 E Street, S.W.
Washington, D.C. 20219
Telephone: (202) 874-5280

Attorneys for *Amicus Curiae*

FAITH S. HOCHBERG
United States Attorney

/s/ Irene Dowdy
IRENE DOWDY
Assistant United States
Attorney
402 East State Street,
Room 502
Trenton, N.J. 08608
Telephone: (609) 989-2190

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 1995, I served 2 copies of the foregoing Brief of Amicus Curiae Comptroller of the Currency in Support of Respondent and Defendant, by United States first class mail, postage prepaid to:

William J. Brennan, Esq.
Smith, Stratton, Wise,
Heher & Brennan
600 College Road East
Princeton, NJ 08540

George O'Brien, Esq.
Dechert Price & Rhoads
214 Carnegie Center
Princeton, NJ 08540

Christopher Lipsett, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420

Michael D. Donovan, Esq.
Pamela P. Bond, Esq.
Chimicles, Jacobsen &
Tikellis
361 West Lancaster Avenue
Haverford, PA 19041

Ann Miller, Esq.
Spector Gadon &
Rosen, P.C.
1700 Market Street,
29th Floor
Philadelphia, PA 19103

Paul R. Rosen, Esq.
Robert L. Grundlock, Jr., Esq.
Spector Gadon &
Rosen, P.C.
107 Fellowship Road
P.O. Box 550
Moorestown, NJ 08057

/s/ Irene Dowdy
IRENE DOWDY
Assistant United
States Attorney